

**BEFORE THE  
RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Petition to Revoke Probation  
Against:

Case No. R-1988

SCOTT WAYNE ROWELL  
1404 E. Vine Court  
Visalia, CA 93292

**DECISION AND ORDER**

The attached proposed Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on January 17, 2006.

It is so ORDERED January 10, 2006.



LARRY L. RENNER, BS, RRT, RCP, RPFT  
PRESIDENT, RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

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RESPIRATORY CARE BOARD  
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In the Matter of the Petition to Revoke  
Probation Against:

SCOTT WAYNE ROWELL  
1404 E. Vine Court  
Visalia, California 93292

Respiratory Care Practitioner License No.  
4692,

Respondent.

Case No. R-1988

OAH No. N2005090278

**PROPOSED DECISION**

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on November 17, 2005.

Complainant Stephanie Nunez, Executive Officer of the Respiratory Care Board of California, was represented by Catherine E. Santillan, Senior Legal Analyst, Department of Justice.

Respondent Scott Rowell was present and represented himself.

The matter was submitted for decision on November 17, 2005.

**FACTUAL FINDINGS**

1. On June 21, 1985, the Respiratory Board of California issued respiratory care practitioner license number 4692 to respondent Scott W. Rowell. The license has been renewed through October 31, 2006.

2. In May 2004, complainant filed an accusation against respondent in Case No. R-1898. It was alleged that respondent was subject to disciplinary action because he had been convicted of driving under the influence of alcohol in November 2000. It was alleged that respondent had been found to have a blood alcohol level in excess of 0.20 percent, that he had previously been convicted of driving under the influence of alcohol in May 1993, that he had been charged in 1998 with using a watercraft under the influence of alcohol but was

subsequently allowed to plead to a charge of failing to reduce speed for a law enforcement vessel, that in February 1999 an accusation had been filed against him (based upon the 1998 conviction), and that he had thereafter entered into a stipulation for a public reprimand in May 1999.

3. In June 2004, respondent signed a stipulation resolving the accusation in Case No. R-1898. Respondent admitted the truth of every allegation in the accusation and agreed to revocation of his license, with the revocation stayed and his being placed on probation for two years upon specified terms and conditions. The board adopted the stipulation as its decision, which became effective on August 16, 2004. The conditions of probation included the following:

Condition 2 required that respondent participate in a random biological fluid testing program approved by the board, and that he fully cooperate and submit tests and samples when directed. The condition further provided that failure to submit to testing or appear as directed for testing would constitute a violation of probation.

Condition 3 required respondent to "completely abstain from the possession or use of alcohol." The condition further provided that "any positive result that registers over the established laboratory cutoff level" would constitute a violation of probation.

Condition 16 provided that the board could revoke probation and carry out the disciplinary order that had been stayed if it were proven that respondent had violated "any term of probation in any respect."

4. On August 24, 2004, respondent met with Kevin Masuda, his board-appointed probation monitor. Respondent signed a "Statement of Understanding" acknowledging the conditions of the board-approved drug and alcohol testing program administered by Compass Vision, Inc. (CVI). This document informed respondent that he was required to call CVI's automated system daily, at which time he would be informed whether a specimen was required to be provided that day. Respondent initialed the following two statements: "I understand if I fail to call the Automated System on a daily basis, I will be in violation of my probation and further disciplinary action may occur" and "I understand if I am prompted to provide a specimen, I will be required to report to an approved Compass Vision collection site." Masuda had the authority to excuse respondent from calling the CVI system on certain days, i.e., if respondent was on vacation.

#### First Cause to Revoke Probation

5. In 2004, respondent failed without excuse to call CVI on December 5, 8, 12, 16, 19, 24, 26, 27, and 31.<sup>1</sup> In 2005, respondent failed without excuse to call CVI on January

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<sup>1</sup> Respondent also failed without excuse to call on November 13, 14, and 28, but these dates were not alleged in the petition to revoke probation.

7, 8, 9, 12, 20, and 22, February 13, 19, 25, and 27, March 3, 5, 6, 10, 19, 25, and 30, April 7, 15, 17, 21, 22, 27, and 29, May 1, 4, 7, 12, 13, 14, 19, and 21, June 4, 8, 10, 11, 13, 17, 18, 23, 24, and 29, July 1, 18, 21, and 23. The petition to revoke probation was served on respondent on July 27, 2005. After receipt of that document, respondent failed without excuse to call CVI on August 20 and September 18 and 19.<sup>2</sup> Those three dates were added to the charges in an amended petition to revoke probation served on respondent on October 11, 2005.

6. Respondent failed without excuse to call CVI on the following dates on or after the amended petition was served: October 11, 17, 21, and 22.

7. On January 4, 2005, respondent called CVI and was directed to provide a specimen for testing and analysis. Respondent failed to appear as directed.<sup>3</sup>

8. The matters set forth in Findings 5, 6, and 7 demonstrate that respondent violated Condition 2 of his probation.

#### Second Cause to Revoke Probation

9. EtG (ethyl glucuronide) is a metabolite formed in the liver with the consumption of alcohol. Its presence can be detected in urine up to five days after alcohol use. EtG can be detected in amounts down to 100 nanograms per milliliter (ng/mL). A result over 250 ng/mL is considered a positive test for alcohol.

10. On four occasions, respondent had positive tests. A sample collected on October 18, 2004, showed EtG in the amount of 740 ng/mL. A sample collected on May 6, 2005, showed 5100 ng/mL. A sample collected on July 20, 2005, showed 870 ng/mL. And a sample collected on August 8, 2005, showed 1400 ng/mL.

11. Respondent admits he drank a glass of wine with his wife on October 16, 2004. He admits he drank sangria at a party on May 5, 2005. And he admits he drank two glasses of champagne at a wedding on August 7, 2005. Respondent does not admit drinking alcohol on, or within days before, July 20, 2005, and he cannot recall doing so. However, the evidence showed that it would be "very unlikely" for an EtG test to show positive due to use of mouthwash containing alcohol, "non-alcoholic" beer or wine, or energy supplements containing malt. It is found that the positive test for the July 20, 2005 sample was the result of alcohol use.

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<sup>2</sup> Respondent also failed without excuse to call on July 28 and September 30, but these dates were not alleged in the petition to revoke probation. Respondent was excused from calling the system for vacations on May 26-30, July 7-15, September 1-8, and October 1-4, 2005.

<sup>3</sup> Respondent had also failed to appear as directed for testing on December 7, 2004. That date was not alleged in the petition to revoke probation.

12. The matters set forth in Findings 9, 10, and 11 demonstrate that respondent violated Condition 3 of his probation.

#### Other Matters

13. Respondent testified he has no excuses for not making daily calls to CVI. But he said that when he signed the stipulation in June 2004 he felt he had no option but to sign it to avoid revocation of his license. And until he met with Masuda two months later he did not know the testing program to which he had agreed would involve daily calls. Respondent testified he is "a very busy man" – in addition to working as a respiratory care practitioner he has a landscaping business and a car detailing business, and has two children, ages 10 and one – so he leads "a hectic life" and finds the daily calling requirement hard to comply with. Respondent works 12-hour shifts as a respiratory care practitioner in the emergency room at Sierra View District Hospital in Porterville. He works four days on, six off, two on, and two off in a two-week period. He works from 5:30 a.m. to 6:00 p.m. and commutes about an hour each way. Compounding his difficulty making daily calls is that he cannot begin calling CVI until 5:30 each morning, the same time he starts work. Because he is very busy at work – the hospital is a major trauma facility – he sometimes cannot find the time to make the call. Of the 50-plus dates listed in the petition to revoke probation on which he did not call CVI, respondent estimates he was at work at the hospital on about 19 of them. Respondent also testified that on his days off he often spends time in the mountains, where there is no telephone coverage.

14. Respondent testified that on those occasions when he did not appear for testing, he immediately called Masuda to explain this was due to a busy night at the hospital.

15. Respondent admitted that when he had a glass of wine with his wife on October 16, 2004, he knew he was violating probation.

16. Respondent wants to retain his license and his job as a respiratory care practitioner. He has worked as a respiratory care practitioner for 20 years and has "never been written up." He has received excellent evaluations. He believes he gets along well with co-workers, supervisors, patients, and family members. His "bad decisions" involving alcohol were all on days off. He never drank when he was working. He has a hard time understanding why the board is placing such demands on him for a non-work-related incident. But if he is permitted to keep his license, he plans "to the best of [his] ability" to call in every day. He believes this petition action is a "slap in [the] rear" that will cause him to "straighten up and not jeopardize [his license] again."

17. Respondent has worked at Sierra View District Hospital for the past six years. His supervisor for the past two years has been respiratory care practitioner Theresa Curran. She has been in management for more than 10 years. She supervises 35 employees at Sierra View. In her prior job at Natividad Medical Center in Salinas she supervised more than 20. She characterizes respondent as "one of those employees you would love to clone." He is



honest, ethical and caring. He is dependable, has an excellent attendance record, and often works extra shifts when needed. He "gives it his all every day." She routinely receives compliments about respondent's hard work from other employees. Curran believes that revoking respondent's license would be detrimental to the public, the hospital, and its patients.

18. Respondent submitted letters from supervisors and co-workers that expressed sentiments similar to those Curran expressed in her testimony and in a letter she wrote.

Dennis Coleman, senior vice president of operations for Sierra View District Hospital wrote that he first met respondent in 1985, when Coleman was director of the respiratory department at Lindsay District Hospital and respondent had just obtained his license. Respondent was a "bright, energetic" practitioner who "became the 'go to' person and was given the difficult and challenging cases." In 1989, respondent was promoted to a management position in the department, a position he held until the hospital was purchased by Sierra View. Respondent filled his duties in the management position beyond Coleman's expectations. Coleman describes respondent as "a clinically gifted professional."

Respiratory care practitioner Keith Arnold has been director of respiratory care at Sierra View since 2003. He has found respondent to be a dependable and reliable worker who seldom takes time off and frequently works extra shifts to provide necessary coverage. He is "a skilled and conscientious RCP, whose performance is consistently of a high quality." He has received formal commendations for the quality and timeliness of his work. His performance evaluations reflect this. He is well liked by co-workers, peers, and patients and their families. He plays a "key role" in providing care to patients at the hospital.

Respiratory care practitioner Michael Sullivan is director of the cancer treatment center at Sierra View. Respondent worked under his direct supervision for seven years, at both Lindsay District Hospital and Sierra View. He described respondent as "a very hard worker who understands exactly what tasks need to get done in order to provide compassionate care to all his patients." His dedication and professionalism served as an example to all he came in contact with, and served to bring his co-workers to a higher level. Sullivan could not recall a time when respondent called in sick during the seven years he supervised him.

Joyce Crawford, RNC, is director of maternal child health at Sierra View. She was formerly director of the emergency department at Lindsay District Hospital and has known and worked with respondent since 1985. He has been an excellent employee who gets along well with everyone. "He always took command of the situation and followed through with his responsibilities as well."

Bruce Peterson is director of general services at Sierra View. He was formerly director of plant operations at Lindsay District Hospital. He has had numerous opportunities to observe respondent at work, including during "stressful patient care situations." Peterson

"would not have any reservation or hesitate in" having respondent care for him in an emergency.

Todd Morrow is lead respiratory therapist at Sierra View. He has worked with respondent since 1988. Respondent is an excellent provider of care who is "very punctual and proficient with his work." Morrow wrote, "Being the lead RCP for [respondent] on the days that he works is always a pleasure. You can count on him to complete his work and always know that his patients have received the best of care. I feel that [respondent] is a true asset to the Respiratory Therapy community. We could use a lot more RT's just like him."

Jeri Surowiec, RCP, has been one of respondent's co-workers since 1997. She holds respondent "in the highest regard for work ethics, values and morals." She wrote:

[Respondent's] professional integrity and compassion for client care is one that should be utilized in training services for all RCP's to view and model themselves after. There is no stone unturned nor shortcut taken by [respondent] as he cares for his patients. In fact, there are times when other RCP's are attempting to deal with a difficult patient with no luck, they will call upon [respondent] to help them. Without any hesitation [respondent] is there to assist and provide the help they need, then see if there is anything else he can help with. If I was ever to be a patient that was in need of an RCP, I would hope that person would hold the same level of care and work ethics as displayed by [respondent].

In the eight years I have had the honor of working alongside [respondent], I have never once observed him to lose his temper, become upset with others or bring outside influences into the work place. He always displays a pleasant approachable demeanor, is very good natured and is quick to compliment or commend others on jobs well done. He has a great deal of empathy towards others and his compassion for harmony and teamwork in a workplace is unprecedented.

### Costs

19. The board has incurred costs of \$5,560 in the investigation and prosecution of the petition to revoke probation. This consists of legal fees of \$5,060 and expert fees of \$500.

## LEGAL CONCLUSIONS

### Causes for Revocation of Probation

1. As set forth in Findings 8 and 12, respondent has violated conditions 2 and 3 of his probation. This constitutes cause under condition 16 to revoke probation and carry out the disciplinary order that was been stayed.

2. The number of times respondent violated probation, especially the number of times he failed to call CVI as required, as well as his explanation that he was often too busy to make the required calls, indicate that respondent has been somewhat cavalier about the importance of complying with his probationary terms. If respondent were to maintain that attitude, and to continue to complain about and chafe against what he views as the burdensome requirements of the probationary terms to which he agreed, he would surely not be successful in his probation. However, respondent has indicated that this proceeding is the "slap in the rear" that will cause him to become more diligent in his compliance with the probationary terms. While the sheer number of probation violations would often merit simply revoking the probation, and with it respondent's license, there is reason here to take a less harsh view. There is no indication that respondent's past alcohol use ever impacted his professional performance. The testimony and letters from co-workers and supervisors show that respondent is a dedicated, hard-working, compassionate and gifted respiratory care practitioner. Therefore, it is determined that revocation of his license at this point would be detrimental to the public interest. Respondent should be allowed another opportunity to show that he can comply with the probationary terms to which he agreed. However, respondent must understand that this is likely his last chance; continued failure to comply with the probationary terms will almost surely result in revocation of his license.

### Costs

3. Business and Professions Code section 3753.5, subdivision (a), provides that in a disciplinary proceeding before the board the administrative law judge may direct "any practitioner . . . found to have committed a violation or violations of law" to pay a sum not to exceed the costs of investigation and prosecution of the case.

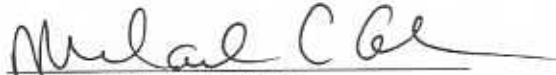
4. No cause for imposition of costs was established. Respondent violated the terms of his probation by failing to make the required calls to CVI, by failing to appear for testing as directed, and by consuming alcohol. But none of these acts violates any law. Complainant's assertion that conditions of probation fall within the term "law," especially in light of Condition 6 of probation ("Respondent shall obey all laws, whether federal, state, or local. Respondent shall also obey all regulations governing the practice of respiratory care in California."), cannot be sustained. A violation of probation that does not independently constitute violation of a statute or regulation does not constitute a "violation of law" within the meaning of section 3753.5, subdivision (a).



## ORDER

The probation granted to respondent Scott Wayne Rowell in Case No. R-1898 is revoked and the disciplinary order that was stayed, revocation of respondent's license, is reimposed. However, that order is again stayed and respondent is placed on probation for two years from the effective date of this decision upon the same terms and conditions that were previously imposed. The "Stipulated Settlement and Disciplinary Order" in Case No. R-1898, attached to this decision, reflects those terms.

DATED: December 8, 2005



MICHAEL C. COHN

Administrative Law Judge

Office of Administrative Hearings